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In the Supreme Court of the United States

NOEL CORNELIO, et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and PHOENIX PROCESSOR LIMITED PARTNERSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The court below held that factory workers engaging in a peaceful work stoppage, to protest an increase in their working hours from 16 to 16-1/2 hours per day, were unprotected by the National Labor Relations Act simply because the factory was aboard a floating vessel. Did the Ninth Circuit misapply this Court's decision in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), by failing to distinguish traditional seamen like those involved in that case from the factory workers in this case, whose only job was to cut and pack fish, *i.e.*, who had no role whatsoever in the propulsion, navigation or handling of the vessel?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are 21 factory workers employed as fish processors whose only job was to cut and pack fish:

Asuncion Aguirre	Baltazar Gonzalez
Winston Brown	Juan Lovos
Jose Cabrera	Miguel Martinez
Joel Camacho	Brad Monaco
Jorge Camacho	Cesar Nieto
Jose Cervantes	Maurisio Ramirez
Noel Cornelio	Juan Reyes
Ricardo Cuevas	Ruben Ruiz
Jose Delgadillo	Luis Verduzco, Jr.
Alfonso Flores	Luis Verduzco, Sr.
Gabriel Garibay	

The petitioners are individuals with no parent companies or subsidiaries. In this Petition, they are collectively referred to as the "workers."

The respondents are (a) the National Labor Relations Board and (b) Phoenix Processor Limited Partnership, the workers' employer and operator of the large fish-processing factory ship *Ocean Phoenix* on which the workers were employed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals is reported at 184 L.R.R.M. (BNA) 2476, 2008 WL 1924931 (May 1, 2008), and is attached to this Petition as Appendix A.

The decision of the National Labor Relations Board (the "Board") is reported at 348 NLRB No. 4, 2006 WL 2559841 (August 31, 2006). The Board's decision, with the administrative law judge's decision appended, is attached to this Petition as Appendix B. The Board's decision ("Board Dec.") is found at Appendix B pages B-1 to B-29 and the ALJ's decision ("ALJ Dec.") is found at pages B-29 to B-84.

JURISDICTION

The memorandum opinion of the Court of Appeals was filed on May 1, 2008. This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case arises from charges brought under sections 7 and 8 of the National Labor Relations Act.

Section 1 of the NLRA sets forth the findings and declaration of policy of Congress when enacting the NLRA, in part as follows:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

Section 7 of the NLRA provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

> other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

29 U.S.C. § 157.

Section 8 of the NLRA provides in relevant part:

> It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

29 U.S.C. § 158(a)(1).

STATEMENT

This case raises an important question regarding the scope of protection afforded by the National Labor Relations Act ("NLRA") to factory workers employed in a factory that happens to be located on a floating vessel, when the workers have no role whatsoever in the propulsion, navigation or handling of the vessel.

In 1942, in a 5-4 opinion, this Court addressed the overlap of potentially conflicting interests of maritime law and labor law in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). The decision assessed the role and rights of traditional seamen employed on the deck and in the engine room of a coastwise cargo ship in the context of labor law

protections afforded to workers. The Court held that employers may terminate such seamen who engage in work stoppages in defiance of the master's orders to return to work, because the safety of the ship and its crew and cargo depends on the master's retaining ultimate command of the ship, and those safety concerns override the interests served by the NLRA. 316 U.S. at 38.

Southern Steamship did not, however, anticipate the expansion of commerce at sea and the new uses of vessels that have developed in recent decades. As a result, it did not address to what extent labor law protections should apply to at-sea factory workers who are more akin to their land-based counterparts than to the traditional blue-water seamen in *Southern Steamship*.

The petitioners involved in this case are factory workers whose sole function aboard the vessel was to cut and pack fish in the processing factory inside the vessel. When their employer increased their 7-days-a-week work schedule from 16 hours per day to 16-1/2 hours per day, they engaged in a peaceful work stoppage in order to meet with the company's management to discuss the adverse impacts of that added half hour. By all accounts, they were polite and peaceful when they stopped work and met with the vessel's master and factory manager. They did not employ violence, attempt to wrest away command of the vessel, or otherwise prevent or interfere with navigation or operation of the vessel.

Petitioners ask the Court to revisit *Southern Steamship* to clarify that factory workers in the factory of a fish processing ship, having no role in the propulsion, navigation or handling of the vessel, are protected by the NLRA to the same extent as their land-based counterparts. The rationale that may apply in the context of traditional seamen, who man the ship's lines, wheel and engines, has no application to factory workers whose sole responsibility is to cut and pack fish in the factory inside a processing ship. An employer's ability to increase its profits from the efforts of overworked laborers is not the sort of maritime interest that prompted this Court in *Southern Steamship* to override the protections offered workers by the NLRA.

A. *Southern Steamship*

In *Southern Steamship*, the cargo ship *City of Fort Worth* was docked in Houston preparing to depart for Philadelphia, its home port, when members of the deck and engineering crew stopped working to coerce their employer into recognizing their union and accepting the results of a union election.[1] The striking crewmembers had previously signed traditional employment contracts, referred to as "shipping articles," binding them to employment with the ship until the ship's voyage terminated in Philadelphia.[2]

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[1] *See Southern Steamship Co.*, 23 NLRB 26, 29, 33 (1940), *rev'd* 316 U.S. 31 (1942).

[2] Shipping articles are documents that are customarily signed by members of a ship's crew and that commit the crew members to employment for the duration of the voyage. *See* 46 U.S.C. §§

When the striking crewmembers disobeyed the direct orders of their master to return to work, he summoned a deputy United States shipping commissioner who came onboard and "read to [the striking crewmembers] that provision of their shipping articles in which they had promised 'to be obedient to the lawful commands' of the master." 316 U.S. at 35. "Deliberately and persistently [the crewmembers] defied direct commands to perform their duties in making ready for the departure from port." *Id.* at 40. The crewmembers did not engage in violence or prevent non-striking crewmembers from doing their duty, "[b]ut short of that, they did what they could to prevent the ship from sailing." *Id.* at 40-41. The crew members halted their strike only when the company's attorney promised to recommend recognition of the union to the company's president, *id.* at 35, but the company later fired five of the strikers for their participation in the strike. *Id.*

Finding that the strike was protected, the NLRB ordered reinstatement of the discharged workers with back pay, and the Third Circuit Court of Appeals affirmed. *Southern Steamship Co. v. NLRB*, 120 F.2d 505 (3d Cir. 1941), *rev'd* 316 U.S. 31 (1942). The Supreme Court, by a 5-4 vote, reversed, holding that the crew's "flouting of the captain's authority" was "deliberate and complete" and that as "a practical matter, the *City of Fort Worth* was definitely wrested from the control of its officers."

10302 (foreign and intercoastal voyages), 10304, 10502 (coastwise voyages).

316 U.S. at 47. While the strike had not led to violence, the Court noted that one of the crew members had testified that the strikers would be "sitting there still" if the company "had not capitulated to their demands." *Id.* at 48. The Court held that the crew's conduct amounted to mutiny and that the maritime policies of protecting the master's ability to command overrode the policies of the NLRA, and thus it was inappropriate for the Board to order reinstatement with back pay to the mutineers. *Id.*

B. Petitioners' Protest

The petitioners in this case are 21 men (the "workers") who cut and packed fish in the factory of a large, fish processing factory ship, the *Ocean Phoenix*. This 680-foot ship operates with over 200 crewmembers, approximately 120 of whom are employed in the factory as fish processors (the "factory workers"). From its home port in Seattle, the vessel travels to and operates in the Bering Sea off western Alaska where it processes fish brought to it by smaller fishing boats. ALJ Dec. at *13 (App. B-31).

The factory workers in this case had no role in the navigation of the vessel; their responsibilities were exclusive to the processing factory. ALJ Dec. at *27 (App. B-61) ("The processing workers herein labored only in the ship's processing factory and had no responsibility for the operation or movement of the ship"). All navigation responsibilities were handled by vessel personnel dedicated to such functions – the master, mate, deck bosses,

deckhands, engineers and other engine room staff. *Id.* ("an entirely different supervisory chain oversaw the factory employees' work than that which oversaw the work of the seamen operating the vessel"). Unlike the traditional seamen in *Southern Steamship*, the workers in this case did not sign shipping articles that bound them to the vessel for the entire voyage. Instead, they signed employment contracts that expressly made their employment terminable at the will of the company or the employee. *See* Board Dec. at *5 (App. B-11).

During winter seasons prior to 2003, the factory workers had worked seven days a week on a 16-hour-per-day schedule. ALJ Dec. at *13 (App. B-32). When they returned to the ship and signed their contracts for the 2003 winter season, they expected to work those same hours. *Id.* at *14 (App. B-33). Prior to the start of that season, however, the company had decided to increase the factory work shift by one-half hour to 16-1/2 hours per day, but it kept its decision secret while the ship was being prepared for departure. *Id.* Only after the *Ocean Phoenix* had put to sea bound for the Bering Sea did the company first tell the factory workers of the company's decision to make them work an extra half hour each day. *Id.* at *15 (App. B-35).

The factory workers protested. They first complained to their supervisors about the change, *id.*, and then they wrote a petition, signed by 70 factory workers, to the factory manager complaining of the hardship imposed by the additional half-hour and seeking a return to their previous 16-hour workday:

> We have been most upset with the 16.5-hour shift. During the signing of our contracts we were informed that our shift would be 16 hours long. That leaves us with 8 hours to sleep, eat, take a shower, brush teeth, shave, et cetera. Taking away 30 minutes or 1/16 of our time off has had a drastic effect on our ability to perform our duties at work and afterwards. If you were to restore our 30 minutes, I think you would find that your crew would be more refreshed to work harder and finish the season successfully. We are all more than willing to pull together to see that no one has to work more than 16 hours in a day.

Id. (App. B-36-37). Hearing no response to their petition to management, the factory workers put together a second petition. *Id.* at *16 (App. B-37-38).

The workers met with management on February 2, 2003 in an attempt to discuss their concerns. *Id.* at *17-*20 (App. B-39-47). The ALJ found that the February 2 meeting resulted from a misunderstanding between the workers and management. The workers "sincerely believed that they had been directed to meet with the [factory] manager." *Id.* at *17 (App. B-40). However, the master and the factory manager believed that the workers had left their work stations without permission. *Id.* at *18 (App. B-42).

Once everyone had arrived at the February 2 meeting, the master and the factory manager refused to discuss the length of the workday and asked the workers to return to their work stations.[3] *Id.* at *18 (App. B-43). Management refused to discuss the longer workday because it believed that to do so would be to give in to group pressure. *Id.* When management refused to discuss the additional half hour, the employees refused to go back to work processing fish, *id.* at *19 (App. B-44-45), and they were fired. *Id.* at *25 (App. B-57) The next day the vessel discharged the protesting workers in Dutch Harbor, Alaska. *Id.* at *20 (App. B-47).

The ALJ specifically found that throughout this chain of events "the protesting employees . . . engaged in no . . . insubordinate or disruptive behavior, did not attempt to set their own conditions of employment, and in no way interfered with [the vessel's] operations or production, except insofar as their absence from processing lines made labor adjustments necessary." *Id.* at *24 (App. B-56-57). *See also id.* at *27 (App. B-62) ("The employees' February 2 work cessation was neither intended to nor did it prevent the ship from functioning as an ocean-going vessel"). They were peaceful, respectful of authority, and obeyed every request made of them by management – except the request that they return to work without discussing the increase in their already-long workday. *Id.* at *20 (App. B-47)

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[3] The ALJ found that the master did not actually order the processors back to work, ALJ Dec. at *18 (App. B-42) ("Captain Smith . . . encouraged them to return to work"), but the NLRB reversed this finding. Board Dec. at *6 (App. B-12).

(the company "had experienced no behavioral problems with the group during the period of walkout through debarkation"). The processors did not try to wrest control of the ship from the captain:

> There is no evidence the protesting employees here had any object other than peacefully to pressure [the company] to discuss the shift increases with them. Their work stoppage was neither destructive nor obstructive . . .

Id. at *28 (App. B-64). In sum, the ALJ found that "the employees here engaged in no misconduct, unless their concerted protest, in itself, can be so characterized."[4] *Id.* at *27 (App. B-63).

After the workers were fired and put ashore in Dutch Harbor, Alaska, the factory manager held a group meeting with the remaining factory workers. He asked for a show of hands by all who wanted to *continue* working 16-1/2 hour shifts. Every single person raised his hand, even though just a few days earlier 70 factory workers had signed a petition asking for a return to the shorter work day. *Id.* at *20 (App. B-48). Shortly thereafter, the factory manager bragged to the company's home office that "[s]ending all those folks home inspired a little fear in those remaining . . ." Email from Fact. Mgr.

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[4] Even the master and the factory manager both admitted that the processors never attempted to take over the ship, never threatened either of them, were always well behaved, and never in any way attempted to usurp the master's control over the ship. ER 48 (Capt. Smith testimony); ER 50 (Fact. Mgr. Hermens testimony).

Hermens to HR Dir. Seitz (2/10/03), Excerpt of Record ("ER") 41. That fear was the true measure of success the company achieved when it suppressed the right of the workers to bargain collectively.

C. Procedural History

On returning to Seattle, the fired workers complained to the Occupational Safety and Health Administration ("OSHA") that the 16-1/2 hour work day was unsafe. OSHA referred the complaint to the U.S. Coast Guard, and the Coast Guard investigated by interviewing some of the workers and the company's human resources director, who supplied the Coast Guard with statements from the master and others. The company did not complain to the Coast Guard that the workers had violated maritime law. The Coast Guard concluded that "this incident appears to be a labor issue and not a safety issue; therefore the [Coast Guard] has no jurisdiction." Coast Guard Rpt. of Investigation into the Circumstances Surrounding Incident Involving Ocean Phoenix (2/6/03) at 2, ER 77-80.

The workers then brought charges before the NLRB that the company unfairly discriminated against them for exercising their right to act collectively. The Board's General Counsel filed a complaint on behalf of the workers, and the matter proceeded as an administrative proceeding before an Administrative Law Judge. After a five-day evidentiary hearing, the ALJ concluded that the company had violated section 8(a)(1) of the NLRA by terminating the workers for exercising their right under section 7 of the NLRA to act collectively. ALJ

Dec. at *30 (App. B-69-70). The ALJ recommended that the Board issue an order of reinstatement and back pay. *Id.* at *31 (App. B-71-73).

By a 2-1 majority the Board rejected the ALJ's recommendation based on its reading of *Southern Steamship v. NLRB*, 316 U.S. 31 (1942). In the Board's view, "the operative facts in this case are indistinguishable from those in *Southern Steamship*" because, it held, the factory workers here were "seamen" who refused to return to work. Board Dec. at *5 (App. B-10). The Board reasoned that under *Southern Steamship*, no shipboard work stoppages by seamen could ever be protected by the NLRA. *Id.* at *5-*7 (App. B-9-14).

The workers sought review by the Ninth Circuit of the Board's interpretation of *Southern Steamship*. In a two-page memorandum opinion, the court of appeals denied the workers' petition for review on the ground that the court was bound by *Southern Steamship* to hold that "seamen" are not entitled to engage in a work stoppage at sea regardless of their role on the ship: "*Southern Steamship* leaves no room for an exception for at-will seamen whose function is that of fish processor." *See* App. A-2-4.

REASONS FOR GRANTING THE PETITION

There are two reasons for granting the workers' Petition for Certiorari and revisiting *Southern Steamship*. First, since 1942, the uses of vessels and the employment of on-board personnel

have expanded and changed in significant ways that the Court could not have foreseen at that time. The rationale of *Southern Steamship*, which addressed traditional seamen, should be revisited to consider these changes to determine whether the Court's reasoning in that case applies to the way factory workers and other non-traditional seamen are used on "special purpose vessels." Second, in interpreting *Southern Steamship* as the beginning and the end of the analysis in this case, the Ninth Circuit thwarted the will of Congress by disregarding the NLRA and the policies it serves and by depriving numerous factory workers of its important protections. The availability of the NLRA's protections to factory workers aboard vessels is an important Congressional policy that this Court should, in its role as chief arbiter of federal maritime law, confirm for the sake of correct application of the NLRA by the Board and the lower courts.

A. *Southern Steamship* Should Be Revisited Because the Nature of Work Performed at Sea Has Changed Dramatically Since 1942

The nature of work performed at sea has changed since 1942 in ways that could not have been envisioned when *Southern Steamship* was decided. While traditional seamen like those in *Southern Steamship* will always be there to man the lines, steer the ship, and run the engines, vessels today do much more than transport passengers and cargo from one port to another. There are now vessels like the *Ocean Phoenix* whose primary function is to serve as a floating factory. There are vessels that

serve as floating platforms for other labor-intensive work such as construction, oil drilling, and seabed mining; for recreational purposes such as gambling, dinner cruises and scuba diving; and for scientific research.

This Court has considered such "special purpose vessels" three times in addressing seaman status for purposes of maritime personal injury claims. In *Steward v. Dutra Construction Co.*, 543 U.S. 481 (2005), the Court recognized that the dredge *Super Scoop*, a massive floating platform with a clamshell bucket that removes silt from the ocean floor and dumps it into adjacent scows, *id.* at 484, is a "vessel." *Id.* at 497. That recognition was made even though the dredge can move short distances on its own only by manipulating its anchors and cables and can move any real distances only by towboat. *Id.* at 484-85. In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), the Court considered floating platforms at a shipyard that were brought alongside vessels under repair to support ship repairmen engaged in their work and to move equipment, materials and supplies around the shipyard and on to and off the vessels under repair. The Court held that a question of fact existed as to whether the floating platforms were "vessels" even though they have no power, means of steering, navigation lights or aids, or living facilities. *Id.* at 83-84, 92. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), the Court addressed whether a paint foreman, whose duties consisted primarily of supervising sandblasting and painting of various fixtures and piping on oil drilling platforms from a vessel, was a seaman for Jones Act purposes when he

did not aid in the navigation of the vessel. *Id.* at 339-40, 355-57. The vessel involved in *Wilander* was a "paint boat" that contained and utilized equipment used in sandblasting and painting oil drilling platforms. *Id.*

The courts of appeals have addressed other types of special purpose vessels in the context of seaman status. In *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998), the court held that a "workover rig" used to plug abandoned wells was a vessel for purposes of the Jones Act. *Id.* at 352-53. That vessel "consisted of a portable truck-mounted workover rig . . . that was driven onto the deck of a leased barge and bolted into place." *Id.* at 346. In the course of its opinion, the *Manuel* court recognized the emergence of "special purpose structures" and "unconventional craft" – such as submersible drilling barges, jack-up rigs, derrick barges, and spud barges – as vessels under maritime law because they are designed for navigation and commerce even though they are "far removed from the conventional notion of ships and seagoing barges." *Id.* at 347-49 and cases cited therein. *See also Holmes v. Atlantic Sounding Co.*, 437 F.3d 441 (5th Cir. 2006) (50-bed "floating dormitory" incapable of self-propulsion); *Bunch v. Canton Marine Towing Co.*, 419 F.3d 868 (8th Cir. 2005) ("cleaning barge" attached by "spud poles" placed vertically through the hull and embedded into the riverbed); *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379 (7th Cir. 2001) (riverboat casino which only moved to comply with state gambling laws).

In the seafood processing industry, there are several types of structures that serve primarily as floating factory platforms but nevertheless constitute vessels for purposes of maritime law. There are fish processing factory ships, or "motherships," like the 680-foot *Ocean Phoenix* that go to sea, follow the fishing fleet, and process fish caught and delivered by fishing boats. There are "catcher-processors," some of which are referred to as "factory trawlers," which are large vessels that both catch and process fish.[5] And there are "floating processors," which are essentially barges on which fish processing factories have been installed, that are moored near fishing grounds during the season, after which they return under their own power or by tow to port.[6] In Alaska alone, there are 121 large floating vessels that are approved by the state of Alaska to process seafood products on board. State of Alaska Dep't of Envtl. Conservation, Div. of Envtl. Health, Food Safety & Sanitation Program, *Seafood Processor Permits, at* http://www.dec.state.ak.us/eh/fss/seafood/permits3.htm (last modified July 6, 2008).[7]

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[5] *See, e.g.*, At-Sea Processors Ass'n, *What You Need to Know About Working on an At-Sea Processor, at* http://atsea.org/working_on_processor.php (last visited July 23, 2008).

[6] "Floating processors" are vessels under federal maritime law. In *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132 (9th Cir. 2002), the court held that a derrick barge rebuilt and operated as a floating fish processing factory was a vessel for seaman status purposes, although it was incapable of self-propulsion, required towing to and from the fishing grounds each season, and while operating was moored in a bay 200 feet offshore by four anchors and a cable affixed to shore and was accessible to land via a floating walkway.

[7] Alaska of course is not the only place in the U.S. with floating processors. For example, there is the 346-foot, fish processing

The development of floating factories and other special purpose vessels has created employment at sea on vessels for many factory workers and other employees who have no role whatsoever in the propulsion, navigation or handling of the vessels on which they work. There is no doubt that if these same workers were employed in the same jobs on land, the NLRA would protect their ability to act in concert to protest and bargain for their working conditions.

Compelling these kinds of at-sea factory workers to follow the commands of ship masters regarding factory work (as distinguished from vessel handling) would not further the policy of safeguarding property and lives at sea, the principle on which the holding in *Southern Steamship* was based. Once the Ninth Circuit and the Board determined that the workers in this case were "seamen" under the broad definition of that term under maritime personal injury law, each ended its analysis in this case. Neither the Ninth Circuit nor the Board gave any real consideration to the workers' limited role aboard the vessel or to the question of

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factory ship M/V *American Freedom*, which operates out of Portland, Maine and follows the herring and mackerel catcher fleets on the Atlantic off the east coast of the U.S. According to an article in the *Commercial Fishing News*, that mothership operates with "10 officers, five seamen who'll handle the catcher boats and pump fish, and 35 crewmen who'll freeze fish." Janice M. Plante, *AMERICAN FREEDOM Ready to Take on Fish At-Sea*, 34 Commercial Fisheries News no. 5 (Jan. 2007), *at* http://www.fish-news.com/cfn/editorial/editorial_1_07/American_Freedom_ready_to_take_on_fish_at-sea.html.

whether *Southern Steamship*'s reasoning is applicable to a factory worker having no role in the navigation or handling of the vessel. In their views, *Southern Steamship* held that no seaman, regardless of his or her role aboard a vessel, may ever engage in an NLRA-protected work stoppage at sea in defiance of the master's order. *Cornelio v. NLRB*, 9th Cir. Memo. Op. at 3 (App. A-3) ("*Southern Steamship* leaves no room for an exception for at-will seamen whose function is that of fish processor."); Board Dec. at *5 (App. B-10-11). In other words, the Ninth Circuit and the Board each failed to address the crux of this case – the distinction between ship handling and factory work, and whether that distinction should be recognized when balancing the conflicting interests between maritime safety and workers' rights under the NLRA. That is the question now presented to this Court.

After 66 years, it is time for the Court to revisit *Southern Steamship* to address the changes in employment of seamen in the context of special, non-traditional uses of vessels. The Court should determine how its holding in *Southern Steamship* applies to the many factory workers and other non-traditional seamen working at sea in floating factories and on other special purpose vessels.

Maritime policies advancing the supremacy and command of vessel masters have little application to at-sea factory workers who have no role in the propulsion, navigation or handling of a ship. A work stoppage or other peaceful, concerted action by such factory workers, even when in defiance of a master's command concerning factory

work as distinguished from vessel handling, does not endanger the safety of the vessel, cargo or lives. These workers do not man the lines, wheel or engines, as the traditional seamen in *Southern Steamship* did. As a result, the maritime policies that overrode application of the NLRA in *Southern Steamship* do not override the policies of the NLRA and the need for its protections to be available to all factory workers, even those whose factory happens to be at sea.

Finally, it bears recognizing that the decision in *Southern Steamship* was issued in the context of events happening at that time. The United States had entered World War II just four months earlier. There was a strong need to preserve sea commerce from labor strife as the country geared up for war. *See* Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 Berkeley J. Emp. & Lab. L. 275, 336 (2004) ("No doubt anxieties generated by the war influenced the Court's decision"). The decision followed also on the heels of the destruction of the S.S. *Normandie* which burned at the dock in New York harbor less then two months before the opinion was issued. This disaster highlighted the importance of deck and engine room crewmembers to maintaining the safety of a vessel, particularly a steamship whose boilers must operate and be maintained even while the vessel remains tied to the dock. *Southern Steamship*, 316 U.S. at 46.

In contrast to the vessel involved in *Southern Steamship*, neither the *Ocean Phoenix* fish processing floating factory, nor the other kinds of

special purpose vessels that have developed in recent decades, are essential for maintaining national security or for mobilizing personnel or materials that could be necessary for wartime. Nor do the factory workers in this case have any role in vessel operations such that their failure or refusal to perform their job duties could put the vessel in danger.

B. The Lower Court Decision Thwarts the Will of Congress Behind the NLRA

In blindly applying *Southern Steamship*'s holding but not its reasoning to the facts here, the Ninth Circuit gave no consideration to the importance of the NLRA's protection of workers' rights or to the will of Congress in enacting that broad-sweeping legislation. In fact, the Ninth Circuit's written decision in this case makes no mention at all of the NLRA. By blindly following *Southern Steamship*, the Ninth Circuit thwarted the will of Congress by disregarding the policies served by the NLRA and by depriving numerous factory workers of its important protections. Applying the NLRA's protections to factory workers aboard vessels would serve an important Congressional policy. This Court should, in its role as chief arbiter of federal maritime law and for the sake of guiding the Board and the lower courts in striking the proper balance between maritime safety concerns and national labor relations policy, revisit the application of the NLRA to workers in floating factories.

Factory workers have a "fundamental right" to organize and to act collectively to improve their

wages, hours and working conditions. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, 43-44 (1937).

> It has been held that the right "to organize for the purpose of securing redress of grievances and to promote agreements with the employers relating to rates of pay and conditions of work" is a constitutional right, and that the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other material protection is fundamental.

Inland Steel Co. v. NLRB, 170 F.2d 247, 258 (7th Cir. 1948), *aff'd* 339 U.S. 382 (1950), citing *Jones & Laughlin Steel*, 301 U.S. at 33. In legislating the NLRA, Congress reinforced and protected the important rights of workers to organize and act collectively. "[A] primary purpose of the [NLRA] was to redress the perceived imbalance of economic power between labor and management, [and] it sought to accomplish that result by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). To accomplish this purpose, the NLRA prohibits acts which interfere with, restrain or coerce employees in the exercise of their rights to bargain collectively and to strike. *Id.*; *see also* 29 U.S.C. §§ 151, 158(a)(1).

The overly broad reading of *Southern Steamship* given by the Board and the Ninth Circuit in this case denies the factory workers' fundamental right to engage in a peaceful work stoppage to discuss working conditions. The workers' actions can in no way compromise the maritime interest which led to the *Southern Steamship* result, *i.e.*, the safety of the vessel. The Court should grant this Petition to consider the question of whether, for the sake of promoting the policies of the NLRA, a distinction should be made between factory workers having no role in vessel handling, and traditional seamen vital to the navigation and safety of a ship.

In *Southern Steamship*, this Court stated that the Board may not serve the policies of the NLRA to the disregard of other important Congressional objectives. *Southern Steamship*, 316 U.S. at 47. The same should be said here for the way the Ninth Circuit and the Board seek to effectuate the policies of maritime law to the complete disregard of the important objectives of the NLRA. The "single-minded approach" taken by the Ninth Circuit and the Board is in further disregard of this Court's teaching in *Southern Steamship*. There the Court clearly stated that competing statutory schemes must be considered together such that "careful accommodation" of one can be appropriately made to the other:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single mindedly that it may wholly ignore other and equally important Congressional objectives.

> Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern Steamship, 316 U.S. at 47. In this case, in disregarding the important labor relations and worker protection policies Congress sought to serve by enacting the NLRA, the Ninth Circuit ignored this Court's express recognition that its holding in *Southern Steamship* does not totally preclude application of the NLRA to seamen. *Id.* at 48 ("It should be stressed that the view we have taken does not prevent the redress of grievances under the Act").

In the context of at-sea factory workers with no role whatsoever in the navigation of the vessel, maritime policies protecting the safety of lives and property at sea cannot trump the purposes and protections of the NLRA without any consideration or weighing of those purposes and protections. Where such purposes conflict as they do here, *Southern Steamship* has told us that one must "carefully accommodate" the other. In this context where navigation and safety of a vessel are not at issue, the general maritime policy that a ship master must be obeyed should not be allowed to obliterate all consideration of the purposes and protections of the NLRA.

Congress has implicitly recognized that under federal maritime law there is an important distinction to be made between traditional seamen and factory workers aboard a fish processing factory vessel when it comes to setting working hours. The traditional seamen who worked the deck, wheelhouse and engine room of the *Ocean Phoenix* did not face the same brutal 16-1/2-hours-a-day, seven-days-a-week schedule imposed on the factory workers. Congress has protected the traditional seamen by limiting their duty time to ensure they have enough rest to conduct their jobs safely. *See* 46 U.S.C. § 8104(k) and (l). Congress has not similarly protected the factory workers, instead leaving it to them to bargain for themselves. Just as their shore-based counterparts have Congressionally-protected rights under the NLRA to bargain for themselves as to factory working conditions and hours, so too should the at-sea factory workers have those same rights under the NLRA.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted this 29th day of July, 2008.

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APPENDICES

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